It was not a contract for the sale of gunny bags to be shipped at some future time at Calcutta either by the s.s. Mausang or by any other vessel but a contract for sale of specified goods on a specified ship arriving at Singapore on or about a specified date; see also condition (1), the contract was "subject to safe arrival of our goods per s.s. Mausang from Calcutta". The goods never did arrive on board the s.s. Mausang because they were never on board.

The law is quite clear on the point where the contract can be construed, as I so construe it. See *Leake on Contracts*, 8th Edition, pages 516, 517, and the authority there quoted, namely *Barrow v. Phillips*[1], and particularly Wright, J.'s remarks on pages 583, and 584. The facts in this case, although somewhat similar, were far more complicated.

This really concludes the matter and I hold that the contract was void for the reasons stated and it is unnecessary to consider other conditions on the contract.

It follows that the deposit must be refunded and there will be judgment for the plaintiffs on the claim and on the counterclaim, with costs.

Judgment for the plaintiffs.

Solicitors: *Battenberg & Talma; Chan, Laycock & Ong*

Re CARLTON A. HIRE.

[O. Cr. J. (Gordon-Smith Ag. C. J.) November 3, 1948]

[Singapore — Originating Motion No. 73 of 1948]

Criminal Procedure Code (Cap. 21), s. 386 — Application for Writ of Habeas Corpus — Application on behalf of a mere stranger or volunteer — Detention of British subject on foreign territory.

In this case an application was made for an order for the issue of a writ of *habeas corpus* to bring before the Court one Carlton Arthur Hire. It appeared that the said Carlton Arthur Hire was detained by the Dutch in the Netherlands East Indies. The application was made on the instruction of one Ivy Taye who was not shown to have any authority to appear on behalf of Carlton Arthur Hire or to represent him.

Held: the applicant in this case was a mere volunteer or stranger and therefore not entitled to the issue of a writ of *habeas corpus* on the facts before the Court.

[**Editorial Note:** Section 386 of the Criminal Procedure Code (Cap. 21) has been repealed and re-enacted by section 375 of the Criminal Procedure Code (Cap. 132).]

Case referred to:—

(1) *In re Ning Yi-Ching & Ors.* 56 T.L.R. 3.

APPLICATION for writ of *habeas corpus.*

S. H. D. Elias for the applicant.

Gordon-Smith Ag. C.J. : — This is an application by way of motion by Mr. Elias for an Order for the issue of a writ of *habeas corpus* directed to Mr. Minns, an Assistant Commissioner of Police, and to the Commissioner of Police, to bring before the Court one Carlton Arthur Hire for the purpose of enquiry concerning him.

It is supported by an affidavit of the 25th October, 1948, by one Ivy Taye to which affidavit there are exhibited correspondence between Mr. Elias and the Attorney-General's office and also various press reports.

The application is made under Chapter XXXIII, section 386 of the Criminal Procedure Code which reads as follows:—

"386. Any person —

(a) who is detained in any prison within the limits of the Colony on a warrant of extradition whether under the Extradition Acts, 1870 and 1873, or under the Fugitive Offenders Act. 1881; or

(b) who is alleged to be illegally or improperly detained in public or private custody within such limits; or

(c) who claims to be brought before the Court to be dealt with according to law;

may apply to the High Court for a writ of *habeas corpus*" and it is under paragraph (c) that the application is made.

At the outset of Mr. Elias's argument I intimated that I should have to be satisfied, before ordering even a rule *nisi* to issue, in respect of two points:—

Firstly, that the application was properly before the Court, and as to who was making the application, and I quoted 9 *Halsbury*, 2nd Edn., p. 721 para. 1229, as follows: "A mere stranger or volunteer, however, who has no authority to appear on behalf of a prisoner or right to represent him will not be allowed to apply for *habeas corpus*", and see cases quoted thereon.

Secondly, that any order the Court might make could be effective.

As regards the first point, the affidavit is made by Ivy Taye who describes herself as a close friend of Carlton Arthur Hire and it is she, according to the affidavit, who has instructed Messrs. Elias Brothers who have initiated these proceedings, as specifically stated both in the affidavit and in the correspondence.

It is true that the formal notice of motion stands in the name of Mr. Elias "of counsel for the above-named Carlton Arthur Hire", but there is no doubt, and can be no doubt, that the proceedings have been initiated by the said Ivy Taye.

Is she, therefore, "a mere stranger or volunteer"?

There is nothing in her affidavit to show that she has any authority to appear on behalf of or right to represent the so called applicant. In fact, it would appear that the application is made without the knowledge, of, or any instructions whatsoever from, the so called applicant, neither does she allege any relationship nor interest in him, apart from being a close friend.

If it is claimed that Carlton Arthur Hire is indeed the applicant, where is the authority required by Order 2 rule 1 of the Supreme Court Rules?

If it is claimed that Ivy Taye is acting as his agent in the matter, how has such agency been created?

There is no information or evidence on the point before the Court. *Prima facie,* on the affidavit, the application is made by Ivy Taye and on the evidence and information contained therein and in the exhibits, she is a mere stranger or volunteer who has no authority to appear on behalf of Carlton Arthur Hire or to represent him.

The application, therefore, fails on this ground alone, but I would observe that such failure does not prejudice a further and better application.

However, I would make the following observations but without attempting to decide on any further points raised.

In the first place, if an order was issued, as prayed, how are the respondents to obey the same, when, according to the information alleged in the exhibits, Carlton Arthur Hire is neither within the jurisdiction nor in the custody of either respondent? Nor has he been in such custody, except merely temporarily in that of Assistant Superintendent Minns for a very brief period before being handed over to the Dutch authorities. Presumably he has committed no offence within our jurisdiction so as to be extraditable from the Netherlands East Indies. Presumably also he has committed offences against the laws of the Netherlands East Indies for which, with the co-operation of the Singapore Police, he was caught red handed and is now detained in custody in the Netherlands East Indies.

Whatever order the Court might make, whether *nisi* or absolute, such would, therefore, appear to be quite ineffective.

The application also of paragraph (a) of section 386 of the Criminal Procedure Code is also distinctly arguable, but, as I have said, there is no necessity for me to go into these points at this stage, as I hold that the application now before me is by Ivy Taye, a mere volunteer or stranger, and that she is not entitled to the issue of *habeas corpus* on the facts before the Court.

This application, is therefore refused.

Since writing the above I have discovered and considered the fairly recent case of *In re Ning Yi-Ching & Ors.*[1] in which the Solicitor-General stated that there was no case on record in which a *habeas corpus* had been obtained on behalf of a foreign subject on foreign territory or even on behalf of a British subject on foreign territory. In his judgment Mr. Justice Cassels confirmed that a *habeas corpus* would not issue in respect of such foreign subject but as the applicants were in fact foreign subjects, it was not necessary to confirm such fact as regards a British subject.

It was, however, also held that the writ could not issue to Lord Halifax, the then Foreign Secretary, because he was not in control of the prisoners but was only acting in an advisory capacity.

Application refused.

Solicitors : *Elias Bros.*

In re SEAH LIANG SEAH, DECD.

[O. C. J. (Taylor J.) November 29, 1948]

[Singapore — Originating Summons No. 55 of 1946]

Will — Codicil — Forfeiture clause — Construction — Estoppel by record — Whether matter at issue has been dealt with in previous proceedings — Res judicata — Obiter dicta.

In this case the testator by his Will made in 1920 appointed his three elder sons to be the trustees and provided for the younger sons to succeed them as vacancies occurred. A forfeiture clause directed that in the event of the insolvency of any beneficiary during "my lifetime or after my death his interest should lapse, subject to a discretionary power of the trustees to maintain him and his dependants from the forfeited interest. The fourth son, Seah Eng Choe, was adjudged bankrupt in 1922 and discharged in 1923 without any judgment or other outstanding liabilities. In 1925 the testator made a Codicil confirming the Will subject to certain alterations which are not material for this case. Three days later he died. In 1940 one of the trustees died and Seah Eng Choe claimed to fill the vacancy; his claim was resisted by another trustee. Seah Eng Choe applied to the Court by Originating Summons No. 137 of 1940 *inter alia* for a declaration that by virtue of the Will he was a trustee. The Summons was heard by Terrell J.A. who decided that Seah Eng Choe was not a trustee by virtue of the Will but that he was eligible to be appointed to fill a vacancy. He also recorded his opinion, as the question of forfeiture had been fully argued, that "no forfeiture of Eng Choe's beneficial interest had been occasioned by his previous bankruptcy and that if he were appointed a trustee there would be nothing to prevent him from enjoying his share of commission". This opinion was incorporated in the formal order. Seah Eng Choe was subsequently appointed a trustee and thereafter his share of the commission was paid. In Originating Summons No. 55 of 1946 an enquiry was ordered as to who were the beneficiaries entitled to share in the trust property and the following issue was ordered to be tried: "Whether the share of Eng Choe in the residuary and other property has been forfeited by reason of his bankruptcy." One of the